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JURISDICTIONAL STATEMENT

Respondent hereby adopts the jurisdictional statement of Informant as valid and accurate.

STATEMENT OF FACTS

Respondent hereby adopts Informant's Statement of Facts as setting forth a reasonably accurate, non-argumentative statement of the underlying facts of this case.

POINT RELIED ON

THE SUPREME COURT SHOULD DISCIPLINE, BUT NOT DISBAR RESPONDENT, BECAUSE THE VIOLATIONS INVOLVED, THOUGH SERIOUS, ARE INSUFFICIENT TO WARRANT DISBARMENT IN THAT:

A. RESPONDENT DID NOT INTEND AT ANY TIME TO DEPRIVE ANY CLIENT OF FUNDS DUE THEM AND DID NOT DO SO;

B. RESPONDENT, AT ALL TIMES, EXPENDED ONLY THOSE FUNDS WHICH HE HAD EARNED FROM LEGAL SERVICES VALIDLY PERFORMED;

C. SUBSTANTIAL MITIGATING FACTORS EXIST WHICH MUST BE CONSIDERED IN DECIDING THIS CASE; AND

D. RESPONDENT'S ACT DO NOT MEET THE PREREQUISITE TEST OF CLEAR AND GROSS MISCONDUCT SUCH THAT RESPONDENT IS UNFIT FOR THE PRACTICE OF LAW.

In re Forge, 747 S.W.2d 141 (Mo. banc 1988)

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ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

THE SUPREME COURT SHOULD DISCIPLINE, BUT NOT DISBAR RESPONDENT, BECAUSE THE VIOLATIONS INVOLVED, THOUGH SERIOUS, ARE INSUFFICIENT TO WARRANT DISBARMENT IN THAT:

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D. RESPONDENT'S ACT DO NOT MEET THE PREREQUISITE TEST OF CLEAR AND GROSS MISCONDUCT SUCH THAT RESPONDENT IS UNFIT FOR THE PRACTICE OF LAW.

A. LACK OF INTENT TO DEPRIVE CLIENTS OF FUNDS

Respondent is currently in his twenty-ninth year of practicing law, interrupted only by his service as a Juvenile Court Commissioner appointed by the Circuit Court of Jackson County, en banc. That appointment exemplifies the esteem in which respondent has long been held in his profession. In 1994 and 1995, respondent began to experience substantial personal and financial difficulties which have been amply set forth in Informant's Statement of Facts. His construction company, Mar-Pen Construction, had incurred substantial tax liability and respondent had been attempting for some time to work out the

matter with the Internal Revenue Service but had not been successful in doing so.[1] Contrary to the unfounded and unsupported conclusion uttered by the Informant, respondent had not attempted to avoid paying the Internal Revenue Service, but had attempted to resolve the matter through offers in compromise. His attempts to survive and maintain a law practice to continue to provide promised services to clients caused respondent to make some unwise choices. His desire was clearly to have the capacity to serve clients and pay his taxes on a reasonable, scheduled basis. That is the manner in which persons normally attempt to retire obligations.

Respondent's practice principally involved criminal matters and small dissolution cases. He did not normally handle significant personal injury matters and normally had little or no client funds in his possession. Thus, in his twenty-nine years of practice, the circumstances at issue provide the only occasion when his handling of client funds has been questioned.

[1]Mar-Pen Construction had been a successful minority construction company, performing all the interior finish work during the construction of Bartle Hall in Kansas City, Missouri.

Prior to withdrawing funds to purchase an office building and make a down payment on an automobile, respondent visited with his banker to demonstrate that he had earned fees in sufficient amounts to enable the withdrawal. Respondent's trust account clearly had sufficient funds to support the withdrawal. The only conceivable reason for respondent's visit with his banker was to assure that he could withdraw funds in anticipation of earnings and that his banker would support such anticipatory use of his earned fees. In respondent's mind, however misguided, he was arranging to spend his earned legal fees in advance. Never was there an intent to deprive clients of their funds, and clients entitled to funds were paid on a reasonably timely basis. Alfred Thomas' check for his share of the settlement was written within two and one-half weeks of the day of settlement and was paid within three weeks of settlement. Andy Hallak's settlement proceeds were paid as dictated by Andy Hallak's father.[2]

[2] As indicated in the record, the Hallaks were long-time friends of respondent and desired to protect Andy Hallak from his personal problems by the method of pay requested of respondent. Andy Hallak voiced no objections to following his father's instructions.

Clear intent to convert funds and mislead the Bar is indicated in such cases as In re Forge, 747 S.W.2d 141 (Mo. Banc 1988), where counsel requested funds to "cover the costs of the transcript and notice of appeal" , deposited the funds in his personal account and attempted to mislead the Bar Committee by pretending that the account into which he deposited the funds was his "Trust Account". Specific intent to misappropriate clients' funds is inescapably apparent in Forge. In In re Charron, 918 S.W.2d 257 (Mo. banc 1996), counsel, immediately after opening his client's probate estate, paid himself Twenty Thousand Dollars ($20,000.00) from the estate without court authority. While counsel in the Charron case was not found to have violated Rule 8.4(c), the court stated: "...the most serious charge against respondent is the **misappropriation of $20,000.00 from the probate estate."** There is no indication that the funds were ever replaced in spite of the fact that the probate court ordered the funds repaid to the estate. Mr. Charron also wasted the sum of Two Hundred Thousand Dollars as Trustee of a pour-over trust, paying himself $70,000.00 in the process. Respondent has not engaged in like gross actions with the intent to permanently deprive his clients of their funds.[3]

B. RESPONDENT EXPENDED ONLY EARNED LEGAL FEES

At the time that respondent wrote a check from his Trust Account in the approximate amount of Twenty-Seven Thousand Five Hundred Dollars, he communicated with his banker to assure that an

[3]Mr. Forge was suspended for six months and Mr. Charron was suspended with leave to apply for reinstatement within one year.

understanding was reached that he could expend funds he had earned in advance. Respondent considered himself to be borrowing against his own funds, and as a matter of fact, expended funds to which he was ultimately entitled. As has been amply demonstrated in the record, all clients due funds were paid those funds within a reasonably short period of time. In spite of the IRS levy in and around the same time, without prompting from the Bar or any third party, respondent assured that clients received the funds due them. Respondent did not make any attempts to expend funds beyond those he had earned. In substance, this circumstance is strikingly substantively similar to Charron, Supra, in that respondent was improvidently taking funds which he had earned before he was entitled to take them, although he considered himself to be writing a check on the authority of the bank. In the somewhat similar circumstance of Charron, after pointing out that the respondent had "misappropriated" funds, this court said:

> **"Here, however, we are presented with a factor not found in previous misappropriation cases - that Respondent was truly owed the money. While this does not excuse the misappropriation, it does act in mitigation. Further, no evidence was presented that the estate was unable to pay other creditors, and had Respondent followed proper probate procedures in filing his claim, he would have received the money owed to him anyway. All in all, we do not believe that disbarment is warranted in this case, even when the misappropriation is coupled with the other violations ..."**

C. SUBSTANTIAL MITIGATING FACTORS EXIST

As the Disciplinary Hearing Panel stated in its decision of May 11, 2001:

"This case is nothing less than a tragedy. The Respondent is, by all accounts, a luminary within the local bar. He has been in continuous private practice for over twenty-seven years and has served as a mentor for countless law students and lawyers over the years. His proteges have gone on to appointments to the state and federal bench, academia and successful public and private sector practice. In reviewing the representative sample of character evidence provided to the Panel, it is clear that Respondent is widely respected for his good nature, work ethic and commitment to serve a chronically under represented constituency of the public. He is a former Juvenile Court Commissioner and past member of the Missouri Supreme Court's Advisory Committee. He has made substantial contributions through community and civil involvements, including service on several not-for-profit boards. Respondent also organized the Kansas City Black Chamber of Commerce and served as its first president. It was a regrettable confluence of financial, marital and health problems, exacerbated by admittedly poor judgment on the part of Respondent, which places him in his current position. Respondent's standing in the community has made the work of this panel very difficult. Additionally, the Panel is very cognizant of the severe impact of disbarment upon

Respondent who is now sixty-three years old. If disbarred, he would likely face insurmountable hurdles if he attempted in the future to return to the practice of law, given the time frame and bar examination conditions for reinstatement application under recently amended Rule 5.28..."

There is much authority for mitigation, particularly where members of the Bar who have made long-standing, significant contributions to the Bar and the community are being judged for isolated actions occurring during a limited period of time. This is especially true where, as here, the respected, contributing member of the Bar has undergone overwhelming medical, psychological, financial, marital and family problems during the period of time when the violations of the Rules occurred. With regard to co-mingling, this court has said:

"It also appears that respondent suffered unfortunate personal, emotional trauma during the early pendency of this complaint....In the absence of mitigating circumstances, this Court has determined that disbarment is the appropriate sanction where a client's funds are <u>commingled with those of the attorney...</u> In this case, the presence of mitigating circumstances and respondent's record of no prior, improper conduct compel a conclusion that suspension is appropriate."

<u>Charron</u>, Supra.

Other cases where such violations as commingling of funds, violations of Rule 8.4(c) and obstructing or misleading the Bar Committee have come before this court and mitigation has been

deemed proper are In re Der Vught, 825 S.W.2d 847 (Mo. banc 1992); In re Tessler 783 S.W.2d 906 (Mo. banc 1990); and In re Kopf, 767 S.W.2d 20 (Mo. banc 1989).

D. RESPONDENT'S ACTS WERE NOT CLEAR AND GROSS MISCONDUCT

Respondent has been candid with the Bar Committee and has not, at any time attempted to mislead them. He is clear that he harbored no intention to engage in dishonesty, misrepresentation, or deceit. After the disciplinary hearing in this matter, respondent understands far better how his actions are viewed. He is remorseful, apologetic, and embarrassed that he may have brought disapprobation on the profession he loves and betrayed the confidence of those for whom he has great respect and esteem. Respondent believes that it is important that throughout all of his personal and economic difficulties, he worked diligently to protect the interests of his clients and their funds which came under his control. Respondent believed that placing client's funds in his trust account would protect them. Even after the IRS levies, he replaced all funds immediately and effected payment to all clients on a reasonably efficient basis. Such acts do not demonstrate "gross misconduct where an attorney is demonstrably unfit to continue in the profession". Respondent's numerous insufficient funds check were the result of many factors including multiple IRS levies, numerous checks written by his impecunious clients which were returned for insufficient funds, respondent's numerous personal and psychological problems and respondent's own inadequate bookkeeping during the indicated period of time.

Instructive in this circumstance is In re Frank, 855 S.W.2d 328 (Mo. banc 1994). The attorney involved in Frank, Supra, during the period under investigation, was found to have committed "thirty-nine ethical violations in the representation of eleven clients demonstrat[ing] a disturbing, continuing disregard for the rights and interests of his clients", including:

a. Undertaking multiple dissolution cases on behalf of clients, accepting attorney's fees and/or filing fees and completely failing to act or communicate with the clients;

b. Refusing to return client's fees when no work had been done and saying the fee was "lost in the mail";

c. Undertaking an insurance claim on behalf of a client and doing no work for a two year period and failing and refusing to return the client's papers on request;

d. Undertaking an adoption matter for a client and failing for a full year to return her telephone calls;

e. Undertaking a support and custody matter and failing and refusing to act for more than ten months while refusing to respond to the client or the Bar Committee;

f. Undertaking a false imprisonment matter on behalf of a client and failing to act for ten months while refusing to respond to the client in any way;

g. Undertaking a criminal matter on behalf of a client on an hourly basis to be billed against the client's father's bond; **making three appearances to have the matter continued and dismissed, expending far too little time on the matter to earn the entire bond fee and failing and refusing to account to the client for the funds or return any portion of the bond funds. When the client's father inquired about the bond funds, Frank informed him that he would "check on the bond" and contact him. Frank never contacted the client or his father or returned the funds, a clear conversion of the money of the client's father.**

h. Undertaking a probate matter, accepting a fee of Two Hundred Dollars, failing to do any

work and refusing to return any of the fee. Frank also would not return the client's calls;

i. Consistently failing and refusing to return any calls from the Bar Committee or its investigators who sought to contact Frank as the result of the numerous complaints filed against him and failing and refusing to appear at the hearing conducted by the appointed Special Master.

This court found that the respondent in the Frank case "consistently engages in bad faith obstruction of disciplinary proceedings...has committed prior disciplinary offenses...[fails] to comply with the committee's requests for information and admonitions to reform his conduct....has refused to acknowledge the wrongful nature of his conduct."

The court found the question of whether to disbar the respondent in the Frank case to be a "close one", but consistent with its view that "the primary purpose of discipline is not to punish the attorney but to protect the public and maintain the integrity of the legal profession", In re Tessler, 783 S.W.2d 906 (Mo. banc 1990), the court suspended the respondent with the right to reapply after two years. The court found no mitigating circumstances. Respondent here has failed, in two notable instances to perform competently in the Harrison and Foster cases, but there are many mitigating circumstances.

In the instant case, the most serious violations occurred between seven and eight years ago. The need to protect the public from the failures of respondent which occurred during the time of unmatched personal and financial problems no longer exists. "In the absence of mitigating circumstances, this court has determined that disbarment is the appropriate sanction where a client's funds are commingled with those of the attorney...In this case, the presence of mitigating circumstances and respondent's record of no prior, improper conduct compel a conclusion that suspension is

appropriate." In re Forge, 747 S.W.2d 141 (Mo. banc 1988). The foregoing exemplifies respondent's circumstance in this case. With the most serious violations being between seven and eight years old, and no further need to protect the public being demonstrated, a disbarment would only serve to impose the most harsh kind of punishment on respondent by effectively ending his legal career. Such a harsh result is unnecessary.

The ABA Standards For Imposing Lawyer Sanctions states at 4.0:

4.1 FAILURE TO PRESERVE THE CLIENT'S PROPERTY

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Under all the circumstances which obtain, including respondent's independent actions to protect his clients' funds without prompting from any outside source and the lack of any further apparent need to protect the public, the foregoing ABA Standard would seem eminently applicable to respondent.

CONCLUSION

Respondent has committed serious violations of the ethical Rules governing the practice of law. He does not deny the poor judgment and impropriety of his actions. The most serious of those infractions occurred seven to eight years ago. Respondent is extremely regretful of his actions and fully admits of his errors of action and judgment. However the need to protect the public from such actions by respondent no longer exists. Disbarment of respondent at this juncture would effectively end a distinguished career of almost thirty years, a career which has been marked by outstanding service to the bench, the bar, the community and the under-served. Respondent is proud and respectful of his position as a lawyer and officer of the court, and desires a final opportunity to prove his commitment. The applicable ABA Standard would call for suspension in this circumstance, where the mitigating factors are great in number. It is believed that the Bar and the public would be best served if respondent is suspended indefinitely with the right to reapply for full admission after one year.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Brief was served on Informant this 27th day of

December, 2001, by placing the same in the United States Mail, postage prepaid, addressed to:

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ATTORNEYS FOR INFORMANT

Basil L. North, Jr.

CERTIFICATION: SPECIAL RULE NO. 1 (c)

I hereby certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Special Rule No. 1(b);

3. Contains 3297 words, according to WordPerfect Suite 8, the word processing system used to prepare this brief; and

4. That McAfee Anti-Virus software was used to scan the disk for viruses and that the disk is virus free.

Basil L. North, Jr.